

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2057

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

DAVID HOLLIS, :

Petitioner-Appellant :

- against - :

HAROLD J. SMITH, Superintendent, Attica :
Correctional Facility, :

Respondent :

-----X

On Appeal from the United States District
Court for the Eastern District of New York

BRIEF FOR PETITIONER-APPELLANT

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Comment, Evolution of a Procedural Hybrid: The Sexual Sociopath Statutes and Judicial Response, 13 Cal. West. L. Rev. 90 (1976).	39
Ferretti, Attica is Termed as Bad as Before 1971 Rebellion, N.Y. Times, July 21, 1976, p. 1, col. 3.	18
Flannery, Meeting the Insanity Defense, 51 J. Crim. L., C. & P.S. 309 (1960).	38
James, Jurors' Evaluations of Expert Psychiatric Testimony, 21 Ohio St. L. J. 75 (1960).	38
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UNITED STATES COURT OF APPEALS
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- against - : DOCKET NO. 77-2057

HAROLD J. SMITH, Superintendent :
Attica Correctional Facility,

Respondent :

- - - - -X

On Appeal from the United States District Court
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BRIEF FOR PETITIONER-APPELLANT

PRELIMINARY STATEMENT

This is an appeal from an order dismissing a petition for a writ of habeas corpus, entered on February 9, 1977, by the Honorable Thomas C. Platt, Judge of the United States District Court for the Eastern District of New York. The opinion and order are unreported and are reproduced at Pages 1 through 8 of the Appendix. Upon an application for reconsideration of this decision, Judge Platt issued a memorandum and order, entered on March 7, 1977, granting the motion for reconsideration and, on reconsideration, adhering to the prior decision. The memorandum and order are reproduced at Pages 9 through 13 of the Appendix.

In the District Court, the petitioner-appellant was represented by James J. McDonough, Attorney-in-Charge, Criminal

Division, Legal Aid Society of Nassau County, New York. In this Court, petitioner-appellant is represented by Matthew Muraskin, Acting Attorney-in-Charge of the Criminal Division. On March 10, 1977, Judge Platt signed an order allowing petitioner to prosecute this appeal in forma pauperis.

ISSUES PRESENTED

I. Was the petitioner's right to due process denied when, after having been convicted of a crime carrying a normal maximum sentence of five years, he was instead sentenced to an indeterminate term of one-day-to-life on the basis of a factual determination made as the result of a hearing in which he was denied the right to a standard of proof of beyond a reasonable doubt, the right to a jury trial, the right to remain silent, and the right to the assistance of counsel at all times?

II. Should it be held that a standard of proof less than beyond a reasonable doubt was applied at petitioner's sex offender hearing where: 1) such a holding would be consistent with New York law and the record of the state proceedings; and 2) the claim that a lesser standard was applied was made and not contested by the State in the state appellate courts and the court below?

III. Was it proper for the District Court to make a factual determination about the state trial court proceedings solely on the basis of an affidavit by the state trial judge that offers a legal opinion rather than a factual statement?

IV. Has petitioner exhausted state remedies on the

claim that a standard of proof less than beyond a reasonable doubt was employed at his sex offender hearing where this claim was rejected on the merits by the state appellate courts and there is no available procedure by which it may be raised again?

STATEMENT OF THE CASE

On August 28, 1964, petitioner David Hollis was charged in Nassau County Indictment Number 20287 with attempted rape in the first degree and two counts of assault in the second degree (A-27-28). He pled guilty on September 23, 1965, to the second count of the indictment, assault in the second degree with intent to commit rape (A-29-36). N.Y. Penal Law of 1901, §242. The penalty provided for this crime in §243 of the Penal Law was a definite prison sentence of up to five years, or a fine of up to one thousand dollars, or both. As the result of a sex offender sentencing statute enacted in 1950 (Laws 1950, c. 525), however, Penal Law §243 also provided for an indeterminate prison term of one day to life. This life sentence was imposed on Hollis by the County Court of Nassau County (Dowsey, J.) on December 8, 1965.

Subsequently, in a case involving a comparable Colorado sex offender sentencing law, the Supreme Court held that a hearing with certain due process protections was required prior to imposition of the one-day-to-life sentence. Specht v. Patterson, 386 U.S. 605 (1967). Specht was applied to the New York law in People v. Bailey, 21 N.Y.2d 588 (1968). As a result, petitioner's sentence was vacated in a state habeas corpus proceeding on September 23, 1968, and he was remanded for resentencing.

A hearing pursuant to Specht and Bailey was held in the Nassau County Court (Kelly, J.) on January 21 and 28, 1969. (A-37-141). On February 20, 1969, Judge Kelly made findings allowing for the imposition of the life sentence (A-144-45), and on February 25, 1969, the one-day-to-life sentence was imposed.¹ (A-146-48).

Petitioner appealed to the Appellate Division, Second Department, arguing that the psychiatric report introduced at the hearing was insufficient and that due process and equal protection were violated at the hearing because he was denied the right to a jury trial, the right to a standard of proof of beyond a reasonable doubt, the right to remain silent, and the right to the assistance of counsel at all times. (A-150-63). The Appellate Division rejected all of these claims on the merits. People v. Hollis, 34 A.D.2d 786 (2d Dept. 1970). Leave to appeal to the Court of Appeals was denied by Judge Breitel. (A-25).

The instant habeas corpus proceeding was commenced in the United States District Court for the Eastern District of New York by order to show cause dated July 11, 1976. (A-15-26). Petitioner challenged his custody on three grounds:

¹ At one point petitioner was paroled, but his parole was revoked and he was returned to prison with a new sentence when he was convicted of attempted possession of a forged instrument. That new sentence has expired and petitioner is currently incarcerated solely because of the one-day-to-life sentence.

- 1) the denial of procedural rights at the 1969 hearing;
- 2) the denial of psychiatric and rehabilitative treatment;
- 3) the denial of constitutional rights in the standards and procedures used by the Parole Board in deciding whether to retain him in prison. State remedies had not been exhausted with respect to the latter two claims and when it became clear that state remedial processes were available, those claims were withdrawn by stipulation of the parties.

On February 9, 1977, the District Court denied petitioner's application for a writ of habeas corpus (A-1-8). On March 7, 1977, the District Court granted a motion for reconsideration and adhered to the original decision. (A-9-13). In the same order petitioner's motion for a certificate of probable cause was denied. However, on June 2, 1977, this Court granted the motion for a certificate of probable cause. (A-14).

STATEMENT OF FACTS

At the psychiatric hearing held in January, 1969, to determine whether the petitioner should be re-sentenced to a term of one-day-to-life, the only evidence presented by the prosecution was the testimony of two psychiatrists, Dr. Henry Pechstein and Dr. Lawrence Sutton. These two doctors based their testimony on a joint examination of the petitioner that lasted approximately 45 minutes and a presentence report prepared by the Nassau County Probation Department. (A-44-45, 92, 94). The report itself was not admitted into evidence (A-141). Neither doctor reviewed the records of the petitioner's examinations at Clinton Prison from 1965 to 1968. (A-51, 111). The testimony of each psychiatrist was that the petitioner suffered from an anti-social personality disorder; Dr. Pechstein's opinion was that Hollis would commit sex crimes (A-47-48), while Dr. Sutton testified that it was impossible to predict the petitioner's behavior outside of a structured environment. (A-96). Both doctors were doubtful that Hollis would improve with treatment. (A-66, 96).

The petitioner testified in his own behalf. He stated that although he had committed offenses in the past, he was now capable of functioning as a responsible member of society. (A-129)

An application that the hearing be conducted as a jury trial was denied. (A-38). No objection was made at the hearing with respect to the standard of proof, the right to remain

silent, or the assistance of counsel. In the Appellate Division, however, all these claims were raised (A-155-63) and rejected on the merits. People v. Hollis, 34 A.D.2d 786 (2d Dept. 1970). The prosecution did not argue that any of these claims had been waived and it was not disputed that the petitioner had been denied the right to a standard of proof of beyond a reasonable doubt. (A-167-68). In the court below, respondent also did not dispute this denial. (A-200-02). Acting on its own motion, however, the District Court solicited an affidavit from the state trial judge in which he stated that he had employed the beyond a reasonable doubt standard. (A-203-04).

Petitioner is presently incarcerated in the Attica Correctional Facility, a maximum security penal institution. It was repeatedly alleged in the District Court that petitioner is treated exactly like all other inmates in Attica and that he receives little or no rehabilitative treatment. (A-19, 206-07, 215-18). This claim was not contested in any manner.

POINT ONE

PETITIONER'S RIGHT TO DUE PROCESS WAS DENIED IN THE STATE COURT HEARING SINCE CRIMINAL PUNISHMENT RESULTED FROM THE HEARING AND HE WAS NOT ACCORDED BASIC PROCEDURAL PROTECTIONS CONSTITUTIONALLY GUARANTEED TO CRIMINAL DEFENDANTS

Petitioner David Hollis was re-sentenced in 1969 to an indeterminate prison term of one-day-to-life. Prior to the imposition of this sentence, a hearing was held to determine whether Hollis was a danger to society or amenable to the treatment that theoretically would be provided. Such a factual determination was required before the life sentence could be imposed. However, Hollis is presently incarcerated in the Attica Correctional Facility, a maximum security penal institution, where he is treated like any other inmate and where he receives little or no therapeutic attention. Since Hollis is thus subjected to a life sentence of criminal punishment on the basis of the factual determinations made as the result of the 1969 hearing, he was entitled at that hearing to the full panoply of procedural safeguards that are constitutionally guaranteed to criminal defendants. In fact, Hollis was denied the right to a jury trial, the right to a standard of proof of beyond a reasonable doubt, the right to remain silent and the right

to the assistance of counsel at all times. Thus, petitioner's rights were violated and the decision of the District Court denying the petition for a writ of habeas corpus should be reversed.

The basic framework for analysis of petitioner's claim was established by the Supreme Court in Specht v. Patterson, 386 U.S. 605 (1967). In Specht the Court reviewed a sentencing alternative created by the Colorado Sex Offenders Act. This statute provided that a criminal defendant convicted of specified sex crimes could be sentenced to an indeterminate prison term of one-day-to-life rather than the normal sentence of ten years if certain findings were made. In order to impose the life sentence, the sentencing court was required to obtain a psychiatric report and to find that the defendant constituted a threat of bodily harm to the public or was an habitual offender and mentally ill. As the Court described the statute:

The Sex Offender Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact . . . that was not an ingredient of the offense charged. The punishment under the second Act is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm. United States v. Brown, 381 U.S. 437, 458.

Specht v. Patterson, supra, 386 U.S., at 608-09. In short, "Under Colorado's criminal procedure . . . the invocation of the Sex Offenders Act means the making of a new charge leading to criminal punishment." Id., at 610. Accordingly, the Court unanimously held that, at the sentencing proceeding, the defendant must "be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings to make meaningful any appeal that is allowed." Id.

The New York statute involved in the instant case (N.Y. Laws 1950, c. 525) is virtually identical to the Colorado statute reviewed in Specht. It provided for a sentence of one-day-to-life for specified sex crimes as an alternative to the normal definite prison sentences authorized for those crimes.² In the petitioner's case, for example,

² The one-day-to-life sentence was omitted from the revised New York Penal Law which was enacted in 1965 and became effective in 1967. During its years of operation, the sex offender sentencing scheme has been the subject of harsh criticism by the New York courts. People ex rel. Hunker v. Smith, 47 A.D.2d 585 (4th Dept. 1975); People v. Capp, 35 A.D.2d 1065 (4th Dept. 1970); People ex rel. Smith v. LaVallee, 29 A.D.2d 248 (4th Dept. 1968); People ex rel. Chumley v. Mancusi, 26 A.D.2d 905 (4th Dept. 1966); People ex rel. Piatt v. LaVallee, 26 A.D.2d 904 (4th Dept. 1966); People ex rel. Kaganovitch v. Wilkins, 23 A.D.2d 178 (4th Dept. 1965); People v. Jackson, 20 A.D.2d 170 (3d Dept. 1963); People v. Fairfield, 9 A.D.2d 981 (3d Dept. 1959); People v. Hutchings, 74 Misc. 2d 914 (Cortland Co. Ct. 1973), rev'd on other grounds, 46 A.D.2d 81 (3d Dept. 1974); People ex rel. Moore v. Degan, 65 Misc.2d 317 (Cortland Co. Ct. 1970); People v. Werker, 64 Misc.2d 999 (Greene Co. Ct. 1970). At present, there are 42 persons still serving one-day-to-life sentences, 25 on parole and 17 in prison. See Exhibit A.

the normal maximum sentence for assault in the second degree with intent to commit rape was five years. Penal Law of 1909, §243. And like the Colorado law, the New York law provided for a psychiatric examination and report prior to sentence. Penal Law of 1909, §2189-a.

One possible distinction was that the New York statute did not clearly require any specific findings to justify the life sentence. In People v. Bailey, 21 N.Y. 2d 588 (1968), however, the New York Court of Appeals held that "the discretion of the sentencing Judge to mete out a one-day-to-life sentence is limited to those cases in which the record indicates some basis for a finding that the defendant is a danger to society or is capable of being benefited by the confinement envisaged under the statutory scheme." Id., at 594. This meant that the statute required "that, in addition to the proof of the underlying sex crime, there must be an additional finding of fact independent of the question of guilt before the indeterminate sentence can be imposed." Id., at 596. Specht was thus applicable to the New York law and a pre-sentence hearing requirement was read into the statute. Id. This requirement was retroactively applied without regard to whether a hearing had been requested at the original sentencing. Id., at 596-98.

Following Bailey, however, the New York courts limited the rights of defendants in sex offender hearings to those rights that had been specifically mentioned in the portion of the Specht opinion quoted above (p. 12, supra.) This list of rights was treated as exhaustive rather than illustrative and many of the procedural safeguards normally available in the criminal trial process were withheld. People v. McCraw, 27 N.Y. 2d 652 (1970), aff'g without opinion, 33 A.D.2d 577 (2d Dept. 1969) (defendant in a sex offender hearing is not entitled to a jury trial, proof beyond a reasonable doubt, privilege against self-incrimination and the right to have counsel present at all stages).

Petitioner submits that this was an incorrect interpretation of Specht. This is evident from the quotation in Specht from the opinion in United States ex rel. Gerchman v. Maroney, 355 F.2d 302 (3d Cir. 1966), a case dealing with a Pennsylvania sex offender sentencing statute absolutely indistinguishable from the New York law:

It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing, the requirements of due process can not be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process

guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine the witnesses against him.

355 F.2d, at 312 (emphasis added), quoted in Specht v. Patterson, supra, 386 U.S., at 609-10. Immediately following this quotation, the unanimous Specht Court stated, "We agree with that view." 386 U.S., at 610. The adoption in Specht of this language from the Gerchman opinion makes it clear that none of the constitutionally required procedural safeguards in a criminal proceeding can be denied to the defendant in a sex offender proceeding. Accord, Davy v. Sullivan, 354 F.Supp. 1320, 1326-27 (M.D. Ala. 1973) (three-judge court). And this language is central to the petitioner's claims, but it was not even referred to by the District Court.

Moreover, the language from Gerchman that was quoted in Specht is actually based on established and obvious principles of due process analysis that are readily applied to the case at bar. Thus, the "but for" cause of the one-day-to-life sentence imposed on the petitioner is the determination made after the 1969 hearing that Hollis is dangerous and possibly amenable to treatment (A-144-45). His conviction for assault with intent to commit rape authorized a maximum sentence of five years and that period

has long since expired.³ This conviction did not allow for a life sentence because, "in addition to the proof of the underlying sex crime, there must be an additional finding of fact independent of the question of guilt before the indeterminate sentence can be imposed." People v. Bailey, 21 N.Y.2d 588, 596 (1968). Or as the Third Circuit stated in dealing with the indistinguishable Pennsylvania statute:

This new finding alone authorized and required the indeterminate sentence of imprisonment for a minimum term of one day and a maximum term of life, instead of the maximum term of imprisonment for five years which is prescribed for assault with intent to ravish. This is much enlarged punishment for an essentially independent criminal offense.

United States ex rel. Gerchman v. Maroney, supra 355 F.2d, at 311.

In other words, the petitioner has been convicted of a crime that might be called "assault with intent to commit rape plus being a sex offender." If he had only been convicted of assault with intent to commit rape, then the maximum sentence he could have received would have been

3 Indeed, the normal maximum sentence for the most serious charge in the indictment against the petitioner - attempted rape in the first degree - was 10 years. N.Y. Penal Law of 1909, §§2010, 261(2). Yet he has served over 12 years because the alternative one-day-to-life sentence was imposed. And it may also be noted that the record of petitioner's guilty plea in 1965 contains no indication that Hollis was advised that he could receive a life sentence (A-29-36). It is obvious that Hollis has gained no advantage from plea-bargaining.

five years and he would long ago have been released. That did not happen because he was also found guilty of the "plus being a sex offender" part of the crime and that, in effect, raises the crime to a higher degree and allows for the far more severe life sentence. Because of the bifurcated procedure that is used, the "plus being a sex offender" element was adjudicated in a separate proceeding after the assault conviction and that was "the making of a new charge leading to criminal punishment." Specht v. Patterson, supra 386 U.S., at 610.

The fact that this bifurcated procedure is followed should not be allowed to confuse the issue. The adjudication of the sex offender part of the charge is not a sentencing proceeding. What New York has done is to charge the petitioner with the crime of being a sex offender and to adjudicate the factual elements of that crime - whether the petitioner is dangerous or amenable to treatment - in a proceeding that lacked basic constitutional safeguards. Those safeguards were required because the difference between a maximum sentence of five years and a life sentence that has already last over 12 years turned on the fact-finders made as a result of this proceeding. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975). Cf., Denton v. Commonwealth, 383 S.W.2d 681 (Ky. 1964) (all criminal protections required

in lunacy proceeding).

This argument might be questionable if, as under sex offender laws in some states, the petitioner's incarceration was a therapeutic form of civil commitment. But there is no question that this is not the case. The petitioner is incarcerated in the Attica Correctional Facility, a maximum security penal institution that may be one of the most punitive of all penal institutions.⁴ It was repeatedly alleged in the District Court that Hollis is treated exactly like all other inmates in Attica and that he receives little or no therapeutic treatment (A-19, 206-07, 215-218). This claim was not contested in any way by respon-

4 See, Attica; The Official Report of the New York State Special Commission on Attica (1972). This report noted that in Attica the "promise of rehabilitation" is a "cruel joke." Id., at 4. That such conditions have persisted was confirmed in a report last year. See, Ferretti, Attica is Termed as Bad as Before 1971 Rebellion, N.Y. Times, July 21, 1976, p. 1, col. 3. The claim that no rehabilitative treatment is provided has been repeatedly raised - usually successfully - by Attica inmates serving one-day-to-life sentences. People ex rel. Hunker v. Smith, 47 A.D.2d 585 (4th Dept. 1975); People ex rel. Chumley v. Mancusi, 26 A.D.2d 905 (4th Dept. 1966); People ex rel. Kaganovitch v. Williams, 23 A.D.2d 178 (4th Dept. 1965); People v. Hutchings, 74 Misc.2d 914 (Cortland Co. Ct. 1973), rev'd on other grounds, 46 A.D.2d 81 (3d Dept. 1974). And in a recent case, judicial notice was taken that Attica is not a rehabilitative institution and this determination was confirmed after an evidentiary hearing. Irving v. Preiser, 79 Misc.2d 486 (Sup. Ct. Erie Co. 1974).

dent, but it was simply ignored by the District Court.

Moreover, even if some rehabilitative treatment were provided, that would not mean that incarceration in Attica is not criminal punishment. Actually, no attempt has ever been made to deny that the New York sex offender law is a penal, criminal measure or to claim that it results in a civil commitment.⁵ As the Third Circuit described the indistinguishable Pennsylvania statute:

The Act leaves no doubt, both in its language and its purpose, that it is a criminal statute and that what is imposed under its authority is criminal punishment. Its title and its text are replete with language which reveals that the proceeding is penal in nature. It may be invoked only after a precedent conviction of guilt of one of the specified crimes and prescribes a new and radically different punishment It is true that the Act provides for periodic psychiatric and psychological examinations which the Board of Parole is to review. But it is no less a criminal proceeding and no less the infliction of criminal punishment because the Act provides for such studies, especially when this is accompanied by the drastic potential of life imprisonment if they do not affirmatively provide a basis for release. This criminal punishment does not lose its characteristic because the Act goes beyond simple retribution. "it would be archaic to limit the definition of 'punishment' [under the Bill of Attainder

5 The legislative history of the law reveals that it was intended as a prototype for a general method of treating criminal offenders. Public Papers of Governor Thomas E. Dewey, 159 et seq. (1950). It was motivated by "the wistful ideal of rehabilitation," Shepard v. Taylor, 556 F.2d 648, 654 (2d Cir. 1977), and is an example of the failure of that approach to penology.

Clause] to 'retribution'. Punishment serves several purposes: retributive, rehabilitative, deterrent-and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." United States v. Brown, 381 U.S. 437, 458 (1965). See also Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Case Comment, 32 U. Chi.L.Rev. 290, 294-98 (1965).

Gerchman v. Maroney, supra 355 F.2d, at 309-10. The fact that petitioner is thus subjected to criminal punishment distinguishes the instant case from several decisions holding that certain criminal due process protections are not required in sex offender or similar proceedings. Those decisions have been explicitly premised on the fact that the proceedings resulted in civil non-punitive and therapeutic commitments in institutions separate from those used to house criminal inmates. Cuthrell v. Director, Patuxent Institution, 475 F.2d 1364, 1366 (4th Cir. 1973); Gomes v. Gaughan, 471 F.2d 794, 800 (1st Cir. 1973); Tippett v. Maryland, 436 F.2d 1153, 1156-57 (4th Cir. 1971), cert. dismissed sub nom., Murel v. Baltimore City Court, 407 U.S. 355 (1972).

In short, petitioner's continued incarceration in a penal institution is based on the fact findings made at the 1969 hearing. For this reason, petitioner was entitled to all of the procedural safeguards normally required in criminal proceedings. This basic due process analysis was ignored

by the District Court. Instead, the District Court apparently believed that the petitioner could be denied certain fundamental safeguards because they were not specifically mentioned in Specht v. Patterson. However, these rights were not mentioned for two reasons: 1) because, as discussed below, it had not yet been held that the states were constitutionally required to grant jury trials to criminal defendants or to use the beyond a reasonable doubt standard of proof; and 2) because the claim that such rights were applicable was not litigated in Specht. Relying on these two factors, both the California Supreme Court and the Seventh Circuit have explicitly rejected the contention that Specht can be read as holding that the right to a jury trial and to a standard of proof of beyond a reasonable doubt are not required in sex offender proceedings. People v. Burnick, 14 Cal. 3d 306, 121 Cal. Rptr. 488, 535 P.2d 352, 359 (1975); United States ex rel. Stachulak v. Coughlin, 520 F.2d 931, 935 (7th Cir. 1975), cert. denied, 424 U.S. 947 (1976) (Stevens, J., concurring). As an examination of the specific claims will make clear, these protections are required under the basic due process analysis in Specht, Gerchman and Mulaney v. Wilbur, 421 U.S. 684 (1975).

A. RIGHT TO PROOF BEYOND A REASONABLE DOUBT

It must be noted at the outset that the District Court

apparently held - on the basis of an affidavit from the state trial judge that was requested by the District Court - that the petitioner was not denied the right to the beyond a reasonable doubt standard at the trial court level. However, it is argued in Point Two, infra, that this decision was incorrect and it will be assumed in this discussion that a lesser standard was employed.

The right to a standard of proof of beyond a reasonable doubt was not mentioned in Specht because it had not yet been held in 1967 that this safeguard was required in state criminal proceedings. In the case of In re Winship, 397 U.S. 358 (1970),⁶ however, the Supreme Court held that "the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id., at 364. Specht v. Patterson, supra, holds that a sex offender law like the New York statute involves "the making of a new charge leading to criminal punishment," 386 U.S., at 610, and requires "a new finding of fact. . . that was not an ingredient of the offense charged." Id., at 608. Thus, Winship clearly requires that the fact findings necessary to justify the imposition of a one-day-to-life sentence on the petitioner - that he is a danger to society or amenable to treatment - be proved beyond a reasonable doubt.

⁶ Winship was decided on March 31, 1970 - after petitioner's hearing (January 21 and 28, 1969) and his resentencing (February 25, 1969), but prior to the Appellate Division decision (May 4, 1970), and the denial of leave to appeal to the Court of Appeals

Winship itself did not concern an ordinary criminal proceeding: the Court was considering a juvenile delinquency prosecution in which the standard of proof of a preponderance of the evidence was used. Nonetheless, it was held that the beyond a reasonable doubt standard was required because "just as in an criminal prosecution, an adverse [] raised the possibility of a loss of liberty and the certainty of stigmatization as a violator of the criminal law." United States ex rel. Stachulak v. Coughlin, 520 F.2d 931, 935 (7th Cir. 1975), cert. denied, 424 U.S. 947 (1976) (Stevens, J. concurring). Cf., Note, The Supreme Court, 1969 Term, 84 Harv. L. Rev. 1, 163 (1970) (Winship applicable to sex psychopath laws).

Applying Winship to the Illinois Sexually Dangerous Persons Act, the Seventh Circuit held in the Stachulak case that the reasonable doubt standard must be employed. In light of the life sentence that was imposed, the Court noted that, "Here, the loss of liberty is as great, if not greater, than the loss in Winship." Id., at 935. And the Court stated that,

Likewise with respect to stigma an involuntary commitment for sexual dangerousness presents an a fortiori case: Unlike the delinquency proceedings in Winship, these actions are not confidential, and an adjudication of sexual dangerousness is certainly more damning than a finding of juvenile delinquency.

6 (continued)
(May 15, 1970). In any event, Winship was held to be fully retroactive in Ivan v. City of New York, 407 U.S. 203 (1972).

Id., at 936. Both the loss of liberty and stigma points are directly applicable to the case at bar.

Two defenses for Illinois's use of the preponderance standard were offered in Stachulak. First, it was claimed that the lesser standard was appropriate because the purpose of the commitment was to provide treatment for the sexual deviant. This claim was rejected:

But this assertion is archaic. All too often the "promise of treatment has served only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits." Cross v. Harris, 135 U.S. App. D.C. 259, 418 F.2d 1095, 1107 (1969). It is well settled that realities, rather than benign motives or non-criminal labels, determine the relevance of constitutional policies. In re Winship, supra, 397 U.S. at 365-66. See In re Gault, 387 U.S. 1, 21, 27, 50 (1967); Breed v. Jones, 421 U.S. at 528 (1975).

Id. In the instant case, there is not even the obstacle of a non-criminal label and, as discussed above, the petitioner is being subjected to punitive incarceration with little or no treatment.

The second defense of the lesser standard in Stachulak was that the reasonable doubt standard is unworkable because, it was claimed, it is impossible to prove beyond a reasonable doubt "that a person is suffering from a mental disorder with a propensity to commit criminal sexual assaults" "[g]iven the uncertainties inherent in the present state of psychiatric diagnosis and prediction." 520 F.2d, at 936.

It is true that psychiatric testimony is often weak. In the instant case, one of the two psychiatrists who testified stated it was impossible to predict what the petitioner's behavior would be outside of a structured environment (A-96), and both doctors were doubtful about the possibilities of treatment (A-66, 96). However, this is no reason for using a lesser standard of proof. Again, the Stachulak opinion is directly applicable to the case at bar.

We are not unaware of the limitations of psychiatric diagnosis. Proof of mental state, however, is a commonplace in the law, and despite the difficulty of establishing many controverted facts in a criminal trial, we steadfastly adhere to the reasonable-doubt burden of proof. *Mullaney v. Wilbur*, 421 U.S. 684, 699-704(1975). If the disparate opinion of psychiatrists and the vagaries of proof and prediction suggest anything, it is the desirability of the utmost care in reaching the commitment decision. See, e.g., Livermore, Malmquist and Meehl, On the Justifications for Civil Commitment, 117 U.Pa.L.Rev. 75 (1968).

Burdens of proof serve to allocate the risk of an erroneous decision between the parties in a lawsuit, and the reasonable-doubt standard reflects society's judgment "that it is far worse to convict an innocent man than to let a guilty man go free." In re Winship, *supra*, 397 U.S. at 372 (Harlan, J., concurring). We recognize that society has a substantial interest in the protection of its members from dangerous deviant sexual behavior. But when the stakes are so great for the individual facing commitment, proof of sexual dangerousness must be sufficient to produce the highest recognized degree of certitude. [Numerous citations].

Id., at 936-37.

On the basis of reasoning similar to the Stachulak analysis, three state courts of last resort have held that the beyond a reasonable doubt standard must be employed in sex offender proceedings. People v. Pembrock, 62 Ill. 2d 317, 342 N.E.2d (1976); People v. Burnick, 14 Cal. 3d 306, 121 Cal. Rptr. 488, 535 P.2d 352 (1975); In re Andrews, Mass. , 334 N.E.2d 15 (1974).⁷ Other courts dealing with purely civil commitments of the mentally ill have held that the deprivation of liberty involved requires use of the reasonable-doubt standard. In re Ballay, 482 F.2d 648, 667 (D.C. Cir. 1973); Suzuki v. Quisenberry, 411 F.Supp. 1113, 1132 (D. Hawaii 1976); Lessard v. Schmidt, 349 F.Supp. 1078, 1095 (E.D. Wis. 1972) (three-judge court), vacated on other grounds, 414 U.S. 473 (1974) (order too indefinite), on remand, 379 F.Supp. 1376, 1379 (1974) (more definite order), vacated on other grounds, 421 U.S. 957 (1975), on remand, 413 F.Supp. 1318 (1976) (decision reconsidered and adhered to); Gibbs v. Helgemoe, N.H. , 367 A.2d 1041 (1977); Addington v. State, 546 S.W.2d 105 (Tex. Civ. App., Beaumont 1977); Turner v. Texas, 543 S.W. 2d 453 (Tex. Civ. App., Austin 1976). See also, State v.

7 It is also noteworthy that the current Colorado Sex Offenders Act - the statute reviewed in Specht, supra, provides for use of the reasonable doubt standard. Colo. Rev. Stat. §16-13-211(2) (1973).

Kamae, 56 Hawaii 628, 548 P.2d 632, 636-37 (1976).

Finally, in the court below respondent attempted to distinguish Stachulak on the basis that the Illinois statute provides for commitment in lieu of criminal prosecution while the New York law provided for proceedings after conviction for a specified sex crime. However, since the New York proceeding in this case determined whether a life sentence rather than a five year sentence would be imposed, this difference in the form of proceedings does not affect the requirement of the reasonable-doubt standard. Mullaney v. Wilbur, 421 U.S. 684 (1975), is directly on point with respect to this question. In Mullaney the Court held that it was unconstitutional to shift the burden of proof to the defendant on a defense that would reduce a murder charge to manslaughter. The State argued that it was permissible to not require the prosecution to disprove this defense beyond a reasonable doubt because the defendant would be convicted of manslaughter anyway and would, therefore, lose his liberty and be stigmatized. Id., at 697. The Court stated that this argument "denigrates the interests found critical in Winship" and went on to hold that,

The safeguards of due process are not rendered unavailing simply because a determination may have been reached that would stigmatize the defendant and that might lead to a significant im-

pairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder [mandatory life sentence], as compared with a verdict of manslaughter [maximum of 20 years imprisonment], differ significantly.

Id., at 698. In the case at bar, the difference between the five year sentence for assault and the life sentence as a sex offender is even greater than the difference in Mullaney. And there is the greatly increased stigma of the sexual psychopath label.

The applicability of Mullaney is not affected by the recent decision in Patterson v. New York, 45 U.S.L.W. 4708 (June 17, 1977). In Patterson the Supreme Court considered a statute that allowed the defendant to reduce his already established liability through proof of an affirmative defense. In the instant case, petitioner's conviction for assault only authorized a five year sentence. It was not until after the fact findings at the sex offender hearing that the petitioner could be subjected to a life sentence. People v. Bailey, supra. Thus, the reasonable-doubt standard was required at the hearing.

B. RIGHT TO A JURY TRIAL

When Specht v. Patterson, supra was decided it had not yet been held that the States were constitutionally required to provide jury trials in criminal cases. Yet, it will be recalled that Specht expressly adopted the language

in Gerchman v. Maroney, supra, holding that all criminal safeguards are required in sex offender proceedings. (pp. 14-15, supra). And Gerchman held that it was "clear that the guarantee of a jury trial would apply to [sex offender proceedings] if the Fourteenth Amendment makes it applicable in state criminal cases." 355 F.2d, at 313.

Subsequently, the Supreme Court held that the jury trial guarantee applied to the states in Duncan v. Louisiana, 391 U.S. 145 (1968).⁸ It was there stated that the Fourteenth Amendment guarantees the right to a jury trial "in all criminal cases which - were they to be tried in a federal court - would come within the Sixth Amendment guarantee." Id., at 149. And the opinion makes it clear that the reach of the Sixth Amendment depends on the severity of the authorized sentence. Id., at 159-62. Undoubtedly, the life sentence imposed on petitioner is sufficient to invoke the jury trial guarantee. Thus, the California Supreme Court held that there is a right to a unanimous jury verdict in sex offender proceedings in People v. Feagley, 14 Cal.3d 338, 121 Cal. Rptr. 509, 535 P.2d 373, 378-86 (1975). See also, Quesnell v. State, 83 Wash.2d 224, 517 P.2d 568 (1973); Commonwealth v. Page, 339 Mass. 313, 159 N.E.2d 82 (1959); People v. Frontczak,

⁸ It was held that Duncan should be applied prospectively only in DeStefano v. Woods, 392 U.S. 631 (1968), but it applies here because petitioner's hearing was held in January, 1969 and Duncan was decided on May 20, 1968.

286 Mich. 51, 281 N.W. 534 (1938).

Ignoring these cases and relying on the Supreme Court's holding in Specht that there must be findings "adequate to make meaningful any appeal," 386 U.S., at 610, the District Court held that,

A judge alone can assess the expert medical opinions of psychiatrists, including their predictions of the convicted offender's future adjustment to treatment and society at large, and make findings which can provide an adequate basis for appellate review.

(A-5). This is, however, a hyper-technical and clearly incorrect reading of Specht. It is, first, a novel contention that only a judge "can assess the expert medical opinions of psychiatrists." It requires no citations to note that judges usually have no special training in psychiatry and that juries regularly assess the expert opinions of psychiatrists in proceedings for the civil commitment of the mentally ill, and in criminal cases involving an insanity defense. Juries are fully competent to perform this task. Quesnell v. State, 83 Wash. 2d 224, 517 P.2d 568, 579 n. 22 (1973) (and sources cited).

Moreover, there is no reason why the Specht requirement of findings makes a jury determination inappropriate. This problem was much more logically evaluated by a court applying Specht to the Maryland defective delinquent procedure, which involves a statutory right to a jury trial:

It is not clear whether the [Specht] Court meant that in jury cases special findings of fact were required, or whether answers to interrogatories would suffice; or merely whether the record must be sufficient to support a general verdict. It is believed that the Maryland practice under which a jury determines defective delinquency vel non, on instructions by the trial court as to the elements, nature and meaning of the term would meet this aspect of due process.

Sas v. State of Maryland, 295 F. Supp. 389, 405-06 n. 12 (D. Md. 1969), aff'd sub nom., Tippett v. Maryland, 436 F. 2d 1153 (4th Cir. 1971), cert. dismissed sub nom., Murel v. Baltimore City Court, 407 U.S. 355 (1972). Thus, the Sas Court saw no unusual difficulties in applying Specht's requirement of findings to juries making factual determinations comparable to those envisioned under the New York sex offender law.

Indeed, the findings made by Judge Kelly in the instant case(A-144-45), rather than illustrating the District Court's point, actually support the view that a jury trial is not inappropriate. Judge Kelly did not analyze the evidence; he simply summarized the testimony. And Judge Kelly's findings amount to little more than "yes" or "no" answers to the questions posed by People v. Bailey, supra, as to whether a defendant in a sex offender proceeding is dangerous or amenable to treatment.

Thus, several states provide for jury trials in sex

offender proceedings. E.g., Ill. Ann. Stat., ch. 38, §105-5 (1972); Ore. Rev. Stat. §426.630 (1971). Yet, if the District Court is correct in holding that only a judge can make the findings required by Specht, then jury trials would be invalid and these statutes violative of due process. Clearly Specht does not require such a ludicrous result.

Finally, the District Court's view that a jury determination is inappropriate in sex offender proceedings is conclusively refuted by the Supreme Court decision in Humphrey v. Cady, 405 U.S. 504 (1972). The petitioner in Humphrey was incarcerated pursuant to the Wisconsin Sex Crimes Act. He challenged an order renewing his commitment beyond the maximum sentence for the crime he had been convicted of on the basis that his right to equal protection was denied because, inter alia, he was not entitled to a jury trial under Wisconsin law. Citing Specht v. Patterson, supra, the Humphrey Court held that the petitioner's equal protection claim was substantial. 405 U.S., at 508-512. The Court noted that Wisconsin had long provided for jury trials in civil commitments and stated that,

Like most, if not all, other States with similar legislation, Wisconsin conditions [compulsory psychiatric treatment] not solely on the medical judgment that the defendant is mentally ill and treatable, but also on the social and legal judg-

ment that his potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty. In making this determination, the jury serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment.

Commitment for compulsory treatment under the Wisconsin Sex Crimes Act appears to require precisely the same kind of determination, involving a mixture of medical and social or legal judgments.

Id., at 509-10. Likewise, New York provides for jury trials in the civil commitment of the mentally ill, N.Y. Mental Hygiene Law §31.35, and the jury must determine whether the subject of the proceedings is mentally ill and needs care and treatment for such person's welfare. Id., at §31.01. Thus, there is no reason why a jury trial is inappropriate in New York sex offender proceedings. Cf., United States ex rel. Hayden v. Zelker, 506 F.2d 1228, 1230 (2d Cir. 1974) (sex offender sentenced to one-day-to-life under the New York law has substantial equal protection claim because of denial of jury trial). In fact, it was explicitly argued to the District Court that a jury trial is not inappropriate because such is provided in New York civil commitment proceedings, but this argument was not mentioned by the District Court.

C. RIGHT TO REMAIN SILENT AND TO THE ASSISTANCE OF COUNSEL

Petitioner's claims that he was denied the right to re-

main silent and that he was denied the assistance of counsel are concerned with the examination of the petitioner by the two psychiatrists who testified as prosecution witnesses at the sex offender hearing. Petitioner's counsel was not allowed to be present at this examination and petitioner was not advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), prior to being questioned by the psychiatrists.

Miranda had been decided by the time that Specht was decided, but no issue was raised in Specht about the right to remain silent and the right to counsel. Under the general due process analysis in Specht, these safeguards are required because the fact findings made at the sex offender hearing authorized harsh criminal punishment. This same basic analysis was employed in the Supreme Court's holding that the privilege against self-incrimination applies to juvenile delinquency proceedings in In re Gault, 387 U.S. 1, 49-50 (1967):

Against the application to juveniles of the right to silence, it is argued that juvenile proceedings are "civil" and not "criminal", and therefore the privilege should not apply. It is true that the statement of the privilege in the Fifth Amendment . . . is that no person "shall be compelled in any criminal case to be a witness against himself." However, it is also clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites

It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to "criminal" involvement. In the first place, juvenile proceedings to determine "delinquency", which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the "civil" label-of-convenience which has been attached to juvenile proceedings. Indeed, in over half the States, there is not even assurance that the juvenile will be kept in separate institutions, apart from adult "criminals". In those States juveniles may be placed in or transferred to adult penal institutions after having been found "delinquent" by a juvenile court. For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil". And our Constitution guarantees that no person shall be "compelled" to be a witness against himself when he is threatened with deprivation of his liberty - a command which this Court has broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom. [Emphasis added].

Again, in the instant case, there is not even the obstacle of a "civil" label and there is no doubt that the petitioner is being subjected to punitive incarceration. Under Gault, therefore, he was entitled to remain silent when questioned by agents of the State.⁹ And Miranda entitled him to have counsel present to protect this right. Yet, the petitioner was examined by two doctors without these safeguards and that examination was almost the sole basis for the testimony

9 The psychiatrists were appointed by the Court and in examining petitioner, they were acting as agents of the State. United States v. Robinson, 439 F.2d 553, 561 n. 8 (D.C. Cir. 1970).

of the psychiatrists, the only evidence offered by the prosecution. In other words, petitioner's life sentence in Attica is almost totally the result of compelled self-incrimination. Petitioner was not advised of his right to remain silent, however, and one of the psychiatrists testified that he tells prisoners he examines "that they are being examined, neither for the defense, nor for the People, but for the Court. And that testimony will not be used against them" (A-69).

The holding in Gault was applied to civil commitments of the mentally ill in Suzuki v. Quisenberry, supra 411 F. Supp., at 1130-32, and in Lessard v. Schmidt, supra 349 F. Supp., at 1100-02. The only reason envisioned by the Lessard Court for not applying the privilege was that it might interfere with the potential for treatment. Id., at 1101. However, since the petitioner is confined in a penal institution where he receives little or no treatment, this countervailing consideration does not exist in the instant case. Thus, several courts have held that the Fifth Amendment privilege applies to sex offender or comparable proceedings. McNeil v. Director, Patuxent Institution, 407 U.S. 245, 254-57 (1972) (Douglas, J., concurring); People v. English, 31 Ill. 2d 301, 307, 201 N.E.2d 455, 459 (1964) (sex offender law); Sevigny v. Burns, 108

N.H. 95, 227A.2d 775 (1967) (sex offender law); People v. Potter, 85 Ill. App. 2d 151, 228 N.E.2d 238 (1967) (sex offender law). Cf., Note, The Supreme Court, 1966 Term, 81 Harv. L. Rev. 69, 174-75 (1967) (Gault applies to sexual deviate commitments).

The only reason offered by the District Court for why the defendant should not be entitled to remain silent and to have counsel present is that these protections would make it difficult for psychiatrists acting as agents of the state, to extract "incriminating" information from the petitioner. This is hardly a valid consideration, if under Gault, the Fifth Amendment applies to statements extracted from petitioner that are used to establish the fact findings that authorize a lifetime of punitive incarceration. The Fifth Amendment always impedes prosecution of crimes, but it is the central element of the adversarial, as opposed to inquisitorial, process that is the hallmark of the American system of criminal justice. Murphy v. Waterfront Commission, 378 U.S. 52, 55 (1964); Malloy v. Hogan, 378 U.S. 1, 7 (1964). Thus, in holding that the Fifth Amendment applies to sex offender proceedings, the New Hampshire Supreme Court stated that,

While the claim of the privilege may in many cases defeat the purpose of the statute . . . , this cannot be the basis for the denial of a constitutional right and the plaintiff may refuse to answer any questions which may tend to incriminate him.

Seigny v. Burns, supra 227 A.2d, at 777.¹⁰

Finally, the conclusion that petitioner was entitled to Miranda warnings and the assistance of counsel during the psychiatric interview is not affected by cases holding that a defendant raising an insanity defense to a criminal charge may be subjected to a pre-trial psychiatric examination. E.g., United States v. Baird, 414 F.2d 700 (2d Cir. 1969), cert. denied, 396 U.S. 1005 (1970). These cases are either based on the theory that the defendant waives the privilege when he raises the insanity defense, e.g., Lee v. Erie County Court, 27 N.Y.2d 432 (1971), or the theory that the defendant's statements are not admissible with respect to

10 Use of the sex offender sentencing procedure would clearly be possible even with the application of the right to remain silent. Indeed, as discussed in the text, several state courts have held that defendants have this right and Colorado provides by statute that when sex offender proceedings are initiated, the defendant must be told orally and in writing of his right to remain silent. Colo. Rev. Stat. §16-13-206(c) (1973). Moreover, in numerous criminal cases insanity defenses have been overcome through the use of only lay testimony by the prosecution coupled with cross-examination of the defendant's experts. E.g., United States v. Dube, 520 F.2d 250 (1st Cir. 1975). See, James, Jurors' Evaluations of Expert Psychiatric Testimony, 21 Ohio St. L.J. 75 (1960); Flannery, Meeting the Insanity Defense, 51 J. Crim. L., C. & P.S. 309, 313-16 (1960); Note, Miranda On the Couch: An Approach to Problems of Self-Incrimination, Right to Counsel and Miranda Warnings in Pre-Trial Psychiatric Examinations of Criminal Defendants, 11 Colum. J.L. & Soc. Prob. 403, 423-26 (1975).

proof of any element of the crime and are "verbal acts", or "real evidence." Baird, supra 414 F.2d, at 708. Even in this situation, the defendant must be told that his statements may be used against him. Id., at 711. In the instant case, the petitioner did nothing to waive his rights and his statements were used to establish the elements of the crime of being a sex offender, resulting in life imprisonment. Thus, the petitioner was entitled to remain silent and to have the assistance of counsel. Comment, Evolution of a Procedural Hybrid: The Sexual Sociopath Statutes and Judicial Response, 13 Cal. West. L. Rev. 90, 107 (1976).

POINT TWO

THE PETITIONER WAS DENIED THE RIGHT TO THE BEYOND A REASONABLE DOUBT STANDARD OF PROOF IN THE SEX OFFENDER HEARING. THE DISTRICT COURT FOLLOWED IMPROPER PROCEDURES IN FINDING THAT HE WAS NOT DENIED THIS RIGHT

No issue was raised about the appropriate standard of proof during the petitioner's 1969 sex offender hearing. On direct appeal to the Appellate Division, however, the petitioner argued that he had been denied the right to the beyond a reasonable doubt standard of proof (A-155, 160, 162-63). This claim was not factually contested and it was rejected on the legal merits by the Appellate Division. People v. Hollis, 34 A.D.2d 786. There was no factual dispute because it was a settled matter of New York law that something less than the reasonable doubt standard was to be employed and because the record strongly suggested that something less had been applied in the instant case. There was also no attempt by respondent to contest this claim in the District Court (A-200-02).

After the case had been pending sub judice for six months, however, the District Court, in an ex parte communication with respondent's counsel, requested that the state trial judge submit an affidavit on the standard of proof he had employed (A-203). This affidavit was submitted and it stated that the reasonable-doubt standard had been used (A-204). Thereafter, the District Court failed to explicitly acknowledge petitioner's objections to consideration of this affidavit. Instead, solely

on the basis of the affidavit, the Court held that the petitioner had not been denied the reasonable-doubt standard (A-6-7). The Court, for unexplained reasons, denied the petitioner's request for an evidentiary hearing on the question of the standard of proof that had been employed. And the Court also refused to offer the petitioner any other method of factually contesting the statement in the affidavit of the state trial judge. Instead, holding that this affidavit was new evidence, the District Court found that the petitioner had failed to exhaust state remedies. The petitioner was remitted to the state courts to raise an ill-defined claim through an unspecified procedure.

Several points may be made about this series of events. First, petitioner submits that it must be held that the reasonable-doubt standard was not employed because that fact was not questioned until the District Court raised the issue and because that conclusion is consistent with New York law and the record of this case. Second, even if the fact of the standard of proof that was employed is open to question, the District Court followed improper procedures in making an ex parte request for an affidavit from the state trial judge and in adopting the statement in this affidavit as a finding of fact without giving the petitioner an opportunity to contest the claim that the state judge had applied the reasonable doubt standard. Third, petitioner has fully exhausted state remedies on the claims raised in this action and there is no available

procedure by which he may raise those claims anew in the New York courts.

A. PETITIONER WAS DENIED THE REASONABLE DOUBT STANDARD

The claim that he was denied the reasonable-doubt standard was first raised by the petitioner in the Appellate Division where it was argued that "proof of his being capable of benefitting from confinement or of his being a danger to society should have been shown beyond a reasonable doubt and not merely by a preponderance of the evidence." (A-175). There was no doubt, therefore, about petitioner's position regarding the standard of proof in the trial court. The District Attorney's brief made no response to petitioner's arguments regarding the burden of proof. Instead, the District Attorney asserted that the same arguments had been made in the briefs in People v. McCraw, 33 A.D.2d 577 (2d Dept. 1969), and had been rejected there (A-167). Indeed, exactly the same claims had been raised in the McCraw case (A-175-87). And the District Attorney did not contest in that case that a lesser standard than beyond a reasonable doubt had been employed. (A-188, 193). Instead, the District Attorney argued that the reasonable-doubt standard was not constitutionally required (A-197).

In the District Court it was alleged in the verified petition for a writ of habeas corpus that petitioner was "denied the right . . . to have the facts underlying the sex offender determination proven beyond a reasonable doubt."

(A-19). Respondent did not contest this allegation. Instead, respondent argued that the reasonable-doubt standard was not constitutionally required, asserting that, "In this area the 'preponderance of the evidence' standard seems much more relevant, since the judgment involved is more like that in a civil matter." (A-202).

Given this position of the State in the New York courts and in the District Court, the question of what standard of proof was used in the sex offender hearing was not really open to question. The State may not adopt a position in the federal habeas court that is contrary to its factual position in the state courts. Application of Martuzas, 400 F.Supp. 1305, 1308-09 (W.D.N.Y. 1975); United States ex rel. Coleman v. Smith, 395 F.Supp. 1155, 1161 (W.D.N.Y. 1975). And there is certainly no need for the District Court to initiate a fact-finding process where the facts are not disputed by the parties. Hyatt v. People ex rel. Corkran, 188 U.S. 691, 711 (1903); Fowler v. Ross, 196 F.2d 25, 29, 32 (D.C. Cir. 1952); United States ex rel. Mitchell v. Fay, 241 F.Supp. 165, 167 (S.D.N.Y. 1965).

In Martuzas, supra and Coleman, supra, the court relied on the decision in Whitely v. Warden, 401 U.S. 560 (1971). In Whitely the issue was whether a magistrate may issue an arrest warrant solely on the basis of a sheriff's complaint that did nothing more than state the sheriff's conclusion that the persons

named in the complaint had committed a particular offense. Holding that this was an insufficient basis for issuance of the warrant, the Supreme Court went on to state that:

There remains the question as to the proper disposition of this case. The State urges us to remand so that it will have an opportunity to develop a record which might show that the issuing magistrate had factual information additional to that presented in Sheriff Ogburn's complaint Yet the State concedes, as on the record it must, that at every stage in the proceedings below petitioner argued the insufficiency of the warrant as well as the lack of probable cause at the time of the arrest. . . . Knowing the basis for petitioner's constitutional claim, the State chose to try those proceedings on the record it had developed in the state courts.

Id. at 569. Accordingly, the Court denied the State's request and remanded with directions to issue the writ. Id.

Martuzas and Coleman applied Whitely to fact situations directly comparable to the instant case. In Martuzas the Court rejected a "plain view" argument by the State and held that a search was illegal. 400 F.Supp. at 1308. The State then argued that the search was valid as a search incident to arrest. This argument was also rejected because, inter alia, "the State argued in their brief in the Appellate Division, Fourth Department, that 'the arresting officer did not conduct the search incidental to the arrest for the traffic violation.' . . . The State cannot urge one ground in the state court and take an inconsistent position here. Whitely v. Warden, 401 U.S. 560 (1971)." Id., at 1308, 1309. Like-

wise, in Goleman the Court, citing Whitely, held that a theory in support of a search that had never been presented to the state courts could not be presented for the first time in the federal courts. 395 F.Supp., at 1161.

In the instant case, the State never claimed that the reasonable-doubt standard was employed at petitioner's sex offender hearing until after the District Court's request, on its own motion, for an affidavit from the trial judge. This position is inconsistent with the position presented to the Appellate Division by the Nassau County District Attorney. Thus, under Whitely, Martuzas and Coleman, the State should be precluded from claiming in this action that the reasonable-doubt standard was used. Since a federal habeas petitioner cannot raise a theory that was not presented to the state courts, Picard v. Connor, 404 U.S. 270 (1971), a contrary ruling would make the exhaustion of state remedies requirement, 28 U.S.C. §2254(b), a totally one-sided penalty. This is particularly true now that Wainwright v. Sykes, 45 U.S.L.W. 4807 (June 23, 1977), has established a far more stringent standard than formerly existed for raising a claim in a federal habeas proceeding that was waived in the state courts. Accordingly, it should be held that a standard of proof less than the reasonable-doubt standard was used at petitioner's sex offender hearing.

However, even if it was necessary to make a factual determination about the standard of proof that was employed, it was not appropriate for the District Court to solicit evidence on this question. This is a somewhat unusual fact question since it does not concern either the historical facts of petitioner's crime or the historical facts relating to the gathering of evidence against him. Instead, it concerns the fact of the legal standard employed by the state trial judge. The cases indicate that the appropriate method of resolving such a factual question is through an examination of the existing record and the state law on the standard.

Thus, in Rogers v. Richmond, 365 U.S. 534 (1961), the issue was whether the Connecticut courts, in deciding if a confession was voluntary, had erroneously considered whether the method used to extract the statement had a tendency to produce an untrue statement. Id., at 541-42. In holding that the erroneous standard had been used, the Supreme Court looked to statements in the record by the trial judge and the opinion of the state appellate court. Id. Support for the view that a truthfulness criterion had been applied was also found in an examination of Connecticut case law. Id., at 543 n. 1.

Likewise, in United States ex rel. Brennan v. Fay, 353 F.2d 56 (2d Cir. 1965), the issue was the standard of proof that had been employed by the state trial judge in an

evidentiary hearing in the state court. Id., at 57-58.

This Court did not remand to the District Court to hold a hearing or to obtain an affidavit from the state judge. Instead, the Court first examined the state record. Finding the record to be unclear, the Court stated that "it does appear reasonable to assume that the judge applied the standard which New York law imposes," id., at 58, and the Court went on to analyze the New York law. Relief was denied because it was concluded that "the law of New York as to the burden of proof in coram nobis, which the state judge here must be assumed to have applied, is consistent with federal habeas corpus law." Id., at 59 (emphasis added).

Turning then to the record of this case, there are several strong indications that the reasonable doubt standard was not applied. In People v. Bailey, 21 N.Y.2d 588, 594 (1968), it was held that there must be "a finding that the defendant is a danger to society or is capable of being benefited by the confinement envisaged under the statutory scheme." In the instant case the findings of the state trial judge, Judge Paul Kelly, were stated in one sentence:

Based on all the testimony, I now find that the defendant is not capable to being returned to society; that he definitely would present a danger to society, if released at this time, and that in a continued controlled environment, there is a possibility that he may be benefited by the treatment which he will be afforded.

(A-145). With respect to the finding required by Bailey that the defendant is amenable to treatment, it is thus clear from Judge Kelly's own opinion that he did not apply the beyond-a-reasonable-doubt standard to this fact issue. Instead, Judge Kelly found only that there was a "possibility" that the petitioner "may" benefit from the treatment that he assumed would be provided.¹¹ This casts considerable doubt on the view that Judge Kelly applied the beyond-a-reasonable-doubt standard to either of the fact findings.

With respect to the other finding required by Bailey--that the defendant is a danger to society--Judge Kelly found that petitioner was "definitely" a danger. It is not clear what standard of proof is implied by the term "definitely." However, the fact that Judge Kelly chose to use this non-legal term suggests that he had no formal burden of proof in mind. Moreover, the minutes of the hearing reveal the context in which Judge Kelly regarded his finding that petitioner was a danger:

MR. CESTARO [Assistant District Attorney]:
If Your Honor please, I believe that if you take into consideration the Defendant's history, we must conclude that he is a danger to society and has been a danger to society right up until

¹¹ Judge Kelly could hardly have held that there was anything more than a "possibility" that the petitioner was amenable to treatment since both psychiatrists who testified expressed strong doubts on this point. (A-66, 96).

1966. The nature of the crimes which he committed --

THE COURT: -- Well, I am not looking so much about whether he is a danger to society or not. What I am looking for is, does he have this mental condition that would warrant this particular type of sentence?

(A-139). Judge Kelly thus viewed the question of whether petitioner was a danger as only one factor in determining whether he had the mental condition warranting a one-day-to-life sentence. This is consistent with Judge Kelly's finding, not required by Bailey, that "the defendant is not capable to [sic] being returned to society." This is not meant to suggest that Judge Kelly somehow failed to follow the dictates of Bailey. Instead, it is petitioner's contention that Judge Kelly viewed the question of whether the petitioner was a danger or amenable to treatment within the context of a discretionary sentence determination. Under Bailey, the one-day-to-life sentence could not be imposed absent "some basis," 21 N.Y.2d, at 594, for believing that the petitioner was dangerous or amenable to treatment, but New York law did not mandate any formal burden of proof for making these findings. No formal burden was mandated because before and even after the Supreme Court decision in Specht v. Patterson, supra, sex offender proceedings were essentially regarded as sentencing proceedings and not proceedings involving the formal due process adjudication of

an independent criminal charge. As the analysis of the case law (see below) reveals, Bailey simply grafted onto this proceeding certain due process rights that were mentioned in Specht and the New York courts did not alter their view that this was essentially a sentencing proceeding.

Thus, while a sentencing court is sometimes directed to consider certain factors or make certain findings prior to the imposition of a particular type of sentence, no formal burden of proof is required and the action of the sentencing court in imposing or not imposing such a sentence is reviewable, if at all, only in terms of abuse of discretion. See, N.Y. Penal Law §§65.00(1), 65.05, 65.20. In the federal system, the sentencing court must consider certain factual matters when imposing a sentence of probation, 18 U.S.C. §3561, or a sentence under the Youth Corrections Act, 18 U.S.C. §5010, but no formal burden of proof is involved in this consideration. The case law reveals that the same rule applies to the New York sex offender sentence.

Prior to Bailey there was some conflict in the case law over what was necessary for imposition of the one-day-to-life sentence. The only statutory requirement was the provision in §2189 - a of the former Penal Law for psychiatric examination and a written report to the court including "all facts and findings necessary to assist the court in imposing sentence."

In one case the trial court held that a one-day-to-life sentence was properly imposed, despite the fact that the psychiatric report did not indicate in any way that the defendant was psychologically a sex deviant, because "section 243 of the Penal Law [of 1909] lodges complete discretion in the sentencing court to impose a sentence of one day to life upon the conviction of assault with intent to commit the felony of rape in the first degree regardless of the results of a psychiatric examination of a defendant." People v. Rhodes, 40 Misc. 2d 108, 109 (Sup. Ct. Queens Co. 1963). This decision was affirmed by the Appellate Division with the statement that, "After the court had obtained a current and pertinent report of a psychiatric examination, it was discretionary with the court as to whether it should impose a sentence of one day to life or such other punishment as was authorized by statute." 21 A.D.2d 906 (2d Dept. 1964). And the Court of Appeals affirmed with the statement that, "Choosing the alternative treatment pursuant to sections 243 and 2189-a of the Penal Law is a matter of sound discretion for the sentencing judge." 15 N.Y.2d 729, 730 (1965), cert. denied, 382 U.S. 859 (1965).

However, other cases were at least somewhat inconsistent with Rhodes. In People v. Jackson, 20 A.D.2d 170, 174 (3d Dept. 1963), it was held that the psychiatric examination and report should "determine whether defendant presents a probable behavior pattern which would render it dangerous to release

him now; and if it does, whether such behavior problem can be favorably affected by custodial medical treatment." (Emphasis added). This type of examination and report was necessary because "[t]he sentence to be imposed would depend on the fully-implemented answers to these questions." Id. Thus, Jackson provided for certain fact findings before the one-day-to-life sentence could be imposed, cf., People v. Kearse, 28 A.D.2d 910 (2d Dept. 1967), and Jackson also suggested a standard of proof on the dangerousness question - a probability standard roughly corresponding to the formal preponderance of the evidence standard. However, in a case where the probable behavior pattern was not established, the Court did not vacate the sentence because of a failure to prove by some evidentiary standard that the defendant was a sex offender.¹² Instead, the court twice modified the defendant's sentence pursuant to the discretionary powers granted by §543 of the former Code of Criminal Procedure, the predecessor provision to §470.15(2)(c) of the current Criminal Procedure Law, providing for the modification of sentence. People v. Mosher, 24 A.D.2d 47 (4th

¹² An intermediate appellate court in New York may reverse or modify a judgment of conviction on the ground that the evidence was not legally sufficient to establish the defendant's guilt. C.P.L. §470.15(2)(a)&(b).

Dept. 1965); 23 A.D.2d 814 (1965).

In two of the three cases decided under People v. Bailey, 21 N.Y.2d 588 (1968), dissenting opinions quoted the probable behavior pattern language in Jackson. People v. Bailey, 28 A.D.2d 126, 129 (2d Dept. 1967)(Hopkins, J., dissenting); People v. Leisen, 28 A.D.2d 926, 930 (2d Dept. 1967)(Munder, J., dissenting). However, the Court of Appeals held only that the record had to indicate "some basis" for the necessary fact findings, id., and that the one-day-to-life sentence was improper "where the record is barren of any evidence to support" these findings. Id., at 596.

In light of this language in Bailey, it is not surprising that subsequent cases treated the imposition of the one-day-to-life sentence as a discretionary sentencing determination requiring only "some basis" in the record for the Bailey findings. E.g., People v. Smith, 33 A.D.2d 590 (3d Dept. 1969). And where a one-day-to-life sentence was modified because the record was barren of any evidence to support the Bailey findings, the reviewing court did not base its decision on the fact that guilt had not been established by legally sufficient evidence. Instead, the Court held that imposition of the one-day-to-life sentence was "an improvident exercise of discretion and that [the] record discloses a proper case for the modi-

*Judge Kelly was the trial judge in the Leisen case. 21 N.Y. 2d, at 589.

fication of sentence under the authority of section 543 of the Code of Criminal Procedure." People v. Bellows, 33 A.D. 2d 641 (4th Dept. 1969).

The appellate history of the instant case and the McCraw case further illustrates this point. In Point I of the McCraw brief (A-169-74) it was argued that the evidence was insufficient to meet the Jackson "probable behavior standard." In response the District Attorney's brief argued that the record provided "a sufficient basis to intelligently impose the one day to life sentence" (A-192). And the District Attorney accurately described New York law in stating that aside from the due process protections specifically mandated by Specht, the sex offender proceeding is governed by "the traditional rules relating to sentence and punishment with respect to the discretion of the sentencing judge."

The Appellate Division affirmed the sentence, stating that, "We have reviewed the entire record and conclude that the sentencing court acted properly (see People v. Rhodes, 15 N.Y.2d 729)." People v. McCraw, 33 A.D.2d 577 (2d Dept. 1969). As noted previously, the Court of Appeals held in Rhodes that imposition of the one-day-to-life sentence was "a matter of sound discretion for the sentencing judge." The Court of Appeals affirmed without opinion the Appellate Division decision in

McCraw. 27 N.Y.2d 652 (1970).

In petitioner's case it was argued that the psychiatric report prepared by the physicians who testified at his hearing was insufficient for imposition of the one-day-to-life sentence (A-150-54). The District Attorney's response was that the report as augmented by the hearing was sufficient, (A-164-66), under the "some basis in the record" test from Bailey. Thus, the District Attorney did not claim that the evidence was sufficient to establish the findings required by Bailey under either the beyond a reasonable doubt standard or the preponderance of the evidence standard. Instead, it was claimed that:

Through the aforementioned reports and hearing there was ample information provided to the sentencing Court to give it sufficient basis to make an intelligent decision on whether or not it should impose the day to life sentence.

We believe and respectfully submit that the lower Court, upon all of the proceedings herein, did not act arbitrarily, but based its judgment upon a sound discretion founded upon the hearing, the probation report and the psychiatric evidence which it heard (People v. McCraw, 33 A.D.2d 577 [1969]).

(A-166). The perspective embodied in the District Attorney's argument is clear: no formal burden of proof is required in sex offender proceedings; instead, this is a sentencing proceeding and the sentencing judge's decision should be allowed to stand unless he acted arbitrarily and abused his discretion.

The Appellate Division affirmed the petitioner's one-day-to-life sentence and it is clear from the Court's opinion that the District Attorney's perspective was adopted:

Defendant's main contention is that the psychiatric report relied upon by the re-sentencing court was "insufficient as a matter of law" to permit imposition of the one day to life sentence. The record developed at the hearing, including the psychiatric report, provided a sufficient basis upon which the court could exercise its discretion (cf. *People v. McCraw*, 33 A.D.2d 577). It is our view that the sentence imposed was proper in the light of that record.

People v. Hollis, 34 A.D.2d 786 (2d Dept. 1970).

In sum, the record in the petitioner's case, the appellate history of the case, and the case law in New York all support the conclusion that New York regards sex offender proceedings as sentencing proceedings. As such, the law in New York is that no formal burden of proof is required in making the finding that the defendant is dangerous or amenable to treatment. And the imposition of a one-day-to-life sentence is reviewable only in terms of abuse of discretion. Thus, under the decisions in Rogers v. Richmond, supra and United States ex rel. Brennan v. Fay, supra, it must be assumed that Judge Kelly followed New York law and denied the petitioner the reasonable-doubt standard.

B. IMPROPER PROCEDURES WERE FOLLOWED BY THE DISTRICT COURT IN HOLDING THAT THE REASONABLE DOUBT STANDARD WAS USED.

Even if, contrary to the arguments above, the District Court could properly receive evidence on the fact of the standard of proof used in the state court, clearly improper procedures were followed in doing this. Acting on its own motion after the case had been pending sub judice for six months, the District Court solicited an affidavit from the state trial judge through an ex parte communication with respondent's counsel (A-12, 203, 205, 208-09).¹² In the affidavit, Judge Kelly "unhesitatingly" states that he used the reasonable doubt standard because, as a former criminal lawyer and a judge who presided over criminal matters, "it would have been beyond [his] comprehension" to have used another standard (A-240).

After receiving a copy of the affidavit, petitioner's counsel submitted a letter (A-205-07), accompanied by a memorandum of law and the Appellate Division briefs in petitioner's case and the Howard McCraw case.¹³ In the letter, petitioner's counsel stated that the memorandum of law offered arguments and

¹²The District Court termed this characterization of its actions "highly improper and somewhat impertinent." (A-12). The Court indicated that a telephone call had been made to petitioner's counsel when the affidavit was solicited, but he was not in. However, no effort was made to leave a message or to speak to another attorney in the office. This does not constitute a "communication" with petitioner's counsel.

¹³The District Court had earlier solicited the Appellate Division briefs in petitioner's case through an ex parte communication with respondent's counsel (A-149). However, petitioner's counsel was not informed of this transaction either (continued on next page)

authorities as to why the Kelly affidavit should not be considered. (A-205-06). These arguments were the ones made in sub-section A of Point Two of this brief. The letter went on to state:

It is respectfully requested that the Court rule on whether the Kelly affidavit will be considered. If it is to be considered, then petitioner requests that an evidentiary hearing be held on the subject of the standard of proof that was applied at petitioner's re-sentencing hearing. A hearing would be required because substantial, disputed issues of fact in a habeas corpus proceeding may not be established by ex parte affidavits alone. Walker v. Johnston, 312 U.S. 275, 287 (1941); Wright v. Dickson, 336 F. 2d 878, 882-83 (9th Cir. 1964); Jones v. Cunningham, 313 F. 2d 347, 349 n.4 (4th Cir.), cert. denied, 375 U.S. 832 (1963); United States v. Salerno, 290 F. 2d 105, 106 (2d Cir. 1961).

(A-206). The petitioner's position was clear: legal objections had been made to consideration of the affidavit and if these objections were overruled, then an opportunity was requested to make an evidentiary response.

Within, at most, one day after receiving petitioner's papers (A-209-10), and without waiting for any reply from respondent, the District Court filed its order and opinion denying the petition. (A-1-8). It was held that Judge Kelly had,

before or after the fact and learned of it only through an examination of the District Court file after the case was decided. (A-209). Yet, long after these briefs had been obtained by the Court, Judge Platt's law clerk told petitioner's counsel that it would be helpful if they were submitted (A-209).

in fact, applied the reasonable-doubt standard (A-7). The only response to petitioner's papers was the following sentence:

While petitioner's attorney vigorously questions this sworn statement of Mr. Justice Kelly in an unsigned and unverified memorandum filed in opposition thereto, he has not served or filed any affidavit or other evidence which directly or indirectly refutes the same.

(A-6). This was a curious response since the Court had never informed petitioner's counsel that evidence was expected. Instead, one day before the affidavit was received by petitioner's counsel, he had telephoned the Court to learn when a decision might be forthcoming and had been told by Judge Platt's law clerk that the affidavit had been solicited. However, the affidavit had not yet been received and its contents were unknown. Petitioner's counsel indicated that if the affidavit created a factual issue, then he would want to respond. (A-208-09). The response was as described above -- a request for a legal ruling first and then, if necessary, the opportunity to offer evidence -- and it drew the bizarre suggestion from the Court that petitioner's attorney was questioning the integrity of Mr. Justice Kelly.

Since the District Court had made no explicit ruling on petitioner's legal objections and no mention of the request for a hearing, the objections and the request were renewed in a letter requesting reconsideration. (A-211). The District Court issued a memorandum and order in which it granted the

motion for reconsideration and adhered to the original decision. (A-9-13). However, the District Court again made no reference to the legal objections to consideration of the Kelly affidavit. Instead, the Court stated that the request for an evidentiary hearing was "more properly addressed to the State Courts" (A-9), and that, "The petitioner's remedy at this point is by way of an appropriate writ to the State Courts in which he may contest the findings of Mr. Justice Kelly which it now appears were based on the 'beyond a reasonable doubt' standard." (A-10). The last quoted sentence makes no sense since it was not the findings of Mr. Justice Kelly that petitioner sought to contest; it was the "fact" that he had used the reasonable-doubt standard.

Petitioner now contends that it was clear error to deny him an evidentiary hearing or any other method of contesting Judge Kelly's statement that the reasonable-doubt standard was employed. First, it is not clear that the Kelly affidavit is even proper material for evidentiary consideration. Judge Kelly does not claim that he remembers the 1969 sex offender hearing and he does not state that he found any indication in the records he reviewed of the standard of proof he used.¹⁴ In fact, as discussed above, the indications that do exist

¹⁴ Judge Kelly does not state what he records he received. His affidavit (A-204) appears to paraphrase the opinion he wrote in 1969 (A-144-45).

in the record cast doubt on Judge Kelly's statement about the standard he applied. The only basis offered in the affidavit for Judge Kelly's statement that he used the reasonable-doubt standard is

That as a County Judge who handled nothing but criminal matters for some nine years preceding this Hearing and who, as an attorney for twenty-five years, it would have been beyond my comprehension to have decided it on any other basis.

(A-204).

This obvious hyperbole¹⁵ is a legal opinion rather than a factual explanation: Judge Kelly is stating that since this was a criminal case and the normal standard of proof in criminal cases is beyond a reasonable doubt, he must have applied the normal standard. With all due respect, the law in New York, as discussed above, is that the reasonable-doubt standard is not required in sex offender hearings. As a legal opinion, therefore, Judge Kelly's statement was incorrect. Thus, an evidentiary hearing or some other method of questioning Judge Kelly -- such as a deposition or interrogatories pursuant to 28 U.S.C. §2246, Anderson v. Johnson, 371 F.2d 84, 94 (6th Cir.

¹⁵ It may be presumed that Judge Kelly used other standards of proof since in a hearing on a motion to suppress physical evidence, the burden is on the defendant to prove his case by a preponderance of the evidence. People v. Whitehurst, 25 N.Y.2d 389, 391 (1969). And the preponderance standard is also used when a defendant seeks to controvert a psychiatric report that he is competent to stand trial. People v. Santos, 43 A.D.2d 73 (2d Dept. 1973). Perhaps most significant is the fact that in hearings to determine whether a convicted defendant is a narcotics addict and thus subject to an extended sentence, the preponderance standard is used. People v. Fuller, 24 N.Y.2d 292, 304 (1969).

1966), aff'd, 390 U.S. 456 (1967) -- was clearly necessary.

In denying any evidentiary proceeding, the District Court treated Judge Kelly's statement as an irrebutable fact. However, as discussed in the quotation above (p.58), substantial, disputed issues of fact in a habeas corpus proceeding may not be decided on ex parte affidavits alone. Accord, Campbell v. Minnesota, 487 F.2d 1, 4 (8th Cir. 1973); Copenhagen v. Bennett, 355 F.2d 417, 421 (8th Cir. 1966). Moreover, what the District Court in effect did was to turn over to the state judge the question of whether he acted properly and this Court has disapproved such a procedure. Fielding v. LeFevre, 548 F.2d 1102, 1104 (2d Cir. 1977). And the instant case is indistinguishable from United States ex rel. Fox v. Maroney, 385 F.2d 839, 840 (3d Cir. 1967), cert. denied, 392 U.S. 939 (1968), where the Court disapproved of the District Court's reliance on a letter from the state trial judge received after the close of a hearing since "no opportunity [was] afforded the petitioner to challenge its credibility."

Thus, if this Court decides that the issue of the standard of proof used at petitioner's sex offender hearing is open to question, there must be a remand to the District Court for some form of evidentiary proceeding.

C. STATE REMEDIES HAVE BEEN EXHAUSTED

If this Court should decide that the District Court properly determined that the reasonable-doubt standard was used in the state court, then, and only then, it must be decided whether petitioner has exhausted state remedies on his claim regarding the standard of proof. There is otherwise no doubt that state remedies have been exhausted since petitioner presented his claim to the state appellate courts and it was rejected on the merits.¹⁶ Castaneda v. Partida, U.S. , 97 S.Ct. 1272, 51 L.Ed. 2d 498, 505 n.4 (1977); Francis v. Henderson, 425 U.S. 536, 542 n.5 (1976); Warden v. Hayden, 387 U.S. 294 n.3 (1967); United States ex rel. Leeson v. Damon, 496 F.2d 718, 720-21 (2d Cir. 1974); United States ex rel. Vanderhorst v. LaVallee, 417 F.2d 411, 412-13 (2d Cir. 1969) (en banc).

The question is presented, however, as to what claim the petitioner has left if the reasonable-doubt standard was, in fact, applied at his sex offender hearing.¹⁷ The only possible claim is that his rights were violated when the Appellate Division -- which has the power to review the sufficiency

¹⁶ It is also to be noted that under New York law, the failure to make an objection in the trial court does not waive the defendant's right to claim an appeal that on erroneous standard of proof was employed. People v. Patterson, 39 N.Y.2d 288, 295-96 (1976), aff'd, 45 U.S.L.W. 4708 (June 17, 1977).

¹⁷ It is difficult to determine from (continued on next page)

of the evidence to prove a criminal charge, C.P.L. 470.15 (2)(a) & (b) -- held that the reasonable-doubt standard was not required and reviewed petitioner's sentence under an abuse of discretion standard. People v. Hollis, 34 A.D.2d 786. Thus, petitioner could make a motion for reargument in the Appellate Division, requesting that the court review the sufficiency of the evidence under the reasonable doubt standard.

There are obstacles, however, to such a motion. The Appellate Division has already held that the reasonable-doubt standard is not constitutionally required. There has been no retroactive change in the law since this claim was rejected by the Appellate Division and the Court of Appeals [People v. McCraw, 27 N.Y.2d 652 (1970)] and a motion for reargument is, therefore, improper. People v. Bronsky, 21 A.D.2d 981 (2d Dept. 1963). And there is no apparent reason why the fact that Judge Kelly used the reasonable-doubt standard should have any affect on this conclusion. The standard of proof

the various statements of the District Court (A-7, 9-10) exactly what the claim is that petitioner should present to the state courts. However, in opposing petitioner's motion in this Court for a certificate of probable cause, respondent argued that the claim was that the Appellate Division had utilized a standard of proof less than the reasonable-doubt standard in reviewing the sufficiency of the evidence at petitioner's sex offender hearing. Petitioner will accept this as the only logical interpretation of the District Court's opinion.

that was in the mind of the trial judge had no impact on the development of the record by the parties and could not affect the Appellate Division's ability to evaluate the sufficiency of the evidence.

Thus, the Appellate Division could entertain a motion for reargument only as a courtesy to the federal courts, a courtesy designed to allow the federal courts to avoid deciding whether the reasonable-doubt standard is required. However, there is no requirement that petitioner utilize a collateral procedure when state remedies have already been exhausted. Brown v. Allen 344 U.S. 443, 448-49 n.3 (1953), Brathwaite v. Manson, 527 F.2d 363, 366 (2d Cir. 1975), rev'd on other grounds, 45 U.S.L.W. 4681 (June 16, 1977). Thus, petitioner should not be required to return to the state court and if this Court decides that the reasonable-doubt standard is required, then the writ should issue unless the Appellate Division reconsiders the sufficiency of the evidence at petitioner's hearing under the proper standard.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE ORDER OF THE COURT BELOW SHOULD BY REVERSED AND THE CASE SHOULD BE REMANDED WITH DIRECTIONS TO ISSUE THE WRIT. IN THE ALTERNATIVE, THE CASE SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING ON THE STANDARD OF PROOF USED AT PETITIONER'S SEX OFFENDER HEARING

Respectfully submitted,

MATTHEW MURASKIN

By

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STATE OF NEW YORK
DEPARTMENT OF CORRECTIONAL SERVICES
THE STATE OFFICE BUILDING CAMPUS
ALBANY, N.Y. 12226

IN WARD
SIONER

July 12, 1977

JACK BIRNBAUM
ASSOCIATE COMMISSIONER

Mr. Howard B. Comet
Appeals Bureau
Legal Aid Society of Nassau County
400 County Seat Drive
Mineola, New York 11501

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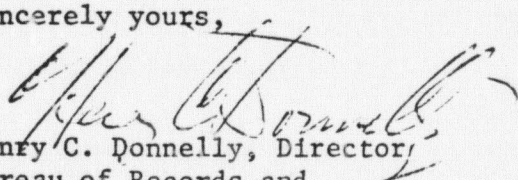
Dear Mr. Comet:

This is in regard to your request for later information on persons committed to the jurisdiction of the Department of Correctional Services who were sentenced under the provisions of the one day to life law. A review of the special file on such cases maintained by our Central File Office shows that there now appear to be the following such cases under jurisdiction:

1. There are 20 inmates now under custody who have received sentences of one day to life. Three of these cases have subsequently been resentedenced, leaving 17 inmates who are apparently serving one day to life sentences.
2. There are 32 persons currently under parole supervision who had received one day to life sentences. Of these, seven cases have been resentedenced, leaving 25 cases under supervision on one day to life sentences.

If more recent or detailed information are required, we would suggest that you write Mr. Bruce Robertson, Director, Division of Support Operations, who may be able to furnish you with additional data.

Sincerely yours,


Henry C. Donnelly, Director,
Bureau of Records and
Statistical Analysis

HCD/bs

cc: John M. Stanton, Ph.D., Director
Division of Program Planning, Evaluation, and Research
Bruce Robertson, Director
Division of Support Operations

EXHIBIT A

STATUTORY ADDENDUM

NEW YORK PENAL LAW OF 1909, §242

§ 242. Assault in second degree

A person who, under circumstances not amounting to the crime specified in section two hundred and forty,

1. With intent to injure, unlawfully administers to, or causes to be administered to, or taken by another, poison, or any other destructive or noxious thing, or any drug or medicine the use of which is dangerous to life or health; or,

2. With intent thereby to enable or assist himself or any other person to commit any crime, administers to or causes to be administered to, or taken by another, chloroform, ether, laudanum, or any other intoxicating narcotic or anesthetic agent; or,

3. Wilfully and wrongfully wounds or inflicts grievous bodily harm upon another, either with or without a weapon; or,

4. Wilfully and wrongfully assaults another by the use of a weapon, or other instrument or thing likely to produce grievous bodily harm; or,

5. Assaults another with intent to commit a felony, or to prevent or resist the execution of any lawful process or mandate of any court or officer, or the lawful apprehension or detention of himself, or of any other person; or

6. Assaults another, either with or without a weapon, with the purpose and intent thereby to collect, receive or obtain from the person so assaulted, or another, payments of principal or interest on any loan, use or sale of money, credit or things in action, or forbearance to collect such money, credit or things in action, at a rate of interest exceeding twenty-five percent per annum in violation of section twenty-four hundred one of this chapter,

Is guilty of assault in the second degree. As amended L.1965, c. 328, § 4, eff. July 1, 1965.

NEW YORK PENAL LAW OF 1909, §243

§ 243. Punishment for assault in second degree

Assault in the second degree is punishable by imprisonment in a penitentiary or state prison for a term not exceeding five years, or by a fine of not more than one thousand dollars, or both; provided, however, any person convicted of assault in the second degree for an assault upon another with intent to commit the felony of rape in the first degree, rape in the second degree, sodomy in the first degree, sodomy in the second degree or carnal abuse may be punished by imprisonment for an indeterminate term, the minimum of which shall be one day and the maximum of which shall be the duration of his natural life. As amended L.1950, c. 525, § 10, eff. April 1, 1950.

NEW YORK PENAL LAW OF 1909, §2189-a

§ 2189-a. Indeterminate sentences of one day to life

No person convicted of a crime punishable in the discretion of the court with imprisonment for an indeterminate term, having a minimum of one day and a maximum of his natural life, shall be sentenced until a psychiatric examination shall have been made of him and a complete written report thereof shall have been submitted to the court. Such examination shall be made in the manner prescribed by sections six hundred fifty-nine, six hundred sixty, six hundred sixty-one and six hundred sixty-two-e of the code of criminal procedure. Such report shall include all facts and findings necessary to assist the court in imposing sentence. A copy thereof shall be transmitted by the clerk of the court to the warden or superintendent of the correctional institution to which the prisoner is committed. Added L.1950, c. 525, § 23; amended L.1951, c. 166, eff. July 1, 1951.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - -x

DAVID HOLLIS,	:	
Petitioner-Appellant	:	
- against -	:	DOCKET NO. 77-2057
HAROLD J. SMITH, Superintendent, Attica	:	AFFIDAVIT OF SERVICE
Correctional Facility,	:	BY MAIL
Respondent	:	

- - - - -x

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

JoAnn Bruckner, being duly sworn, deposes and says,
that deponent is not a party to the action, is over 18 years of
age and resides at Deer Park, New York.

That on the 29th day of August, 1977, at 5:00 P.M.
deponent served the within brief and appendix upon
Louis J. Lefkowitz, Attorney General of the State of New York,
Two World Trade Center, New York, New York, 10047, the
respondent herein, by depositing a true copy thereof in a mailbox
exclusively maintained and controlled by the United States Postal
Service and located at 400 County Seat Drive, Mineola, New York.

JoAnn Bruckner

Sworn to before me this
29th day of August 1977.

Morton J. Marshack

MORTON J. MARSHACK
NOTARY PUBLIC, State of New York
No. 4650418
Qualified in Nassau County
Commission Expires March 30, 1979.

